No. 80-953

In the Supreme Court of the United States

OCTOBER TERM, 1980

CITY OF CHICAGO, a municipal corporation,

Petitioner,

vs.

NATIONAL ORGANIZATION FOR WOMEN, SUSIE BATES, MATTIE SCOTT, ODESSA GATES, ELEANOR PROTAS, and VERA SANFORD,

Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

R. MARLIN SMITH
One IBM Plaza
Suite 3100
Chicago, Illinois 60611
(312) 467-9300
Counsel for Respondents

BARBARA BARAN,
ROSS, HARDIES, O'KEEFE,
BABCOCK & PARSONS
One IBM Plaza, Suite 3100
Chicago, Illinois 60611

KAY SIMON GROSSMAN,
CHICAGO LAWYERS COMMITTEE
FOR CIVIL RIGHTS UNDER LAW
200 South State Street, Room 300
Chicago, Illinois 60604
Of Counsel

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

QUESTIONS PRESENTED

The United States Court of Appeals for the Seventh Circuit affirmed the decision of the Honorable John F. Grady of the Federal District Court for the Northern District of Illinois holding that the City of Chicago discriminated against a class of females classified as custodial assistants in the City of Chicago's Department of Public Works. The Seventh Circuit Court of Appeals reversed and remanded Judge Grady's decision with respect to the clerical class for the Judge to make further written findings. In its opinion, the Court of Appeals rejected the City's argument that the lower wages paid to female custodial employees of the Department of Public Works and female clerks in the Department of Water and Sewers resulted from a merit employment system. The Court of Appeals also declined to overturn Judge Grady's finding that the City of Chicago intentionally discriminated against members of the custodial employee class.

In view of the Court of Appeals' decision, Respondents must take issue with Petitioner's statement of the questions presented. No court has yet held that the City of Chicago has a *bona fide* merit employment system. Therefore, the question is whether the City of Chicago has a *bona fide* merit employment system which exempts it from the application of the Equal Pay Act, 29 U.S.C. §206(d) and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*

The second question posed by the City does not accurately characterize the decision of the Seventh Circuit. In its opinion, the Court of Appeals affirmed Judge Grady's

findings as to intentional discrimination with regard to female custodial employees and in so doing, noted that it assumed the case was one of disparate treatment. (Unpublished Order p. 7, Appendix p. 34a). The Petitioner is asking the United States Supreme Court to consider an issue not decided by the Seventh Circuit Court of Appeals.

TABLE OF CONTENTS

PAGE

Questions Presented i

Table of Authorities iii

Additional Statement of the Case 2

Summary of Reasons for Denying the Writ 10

Reasons for Denying the Writ 11

1. The City of Chicago Has No *Bona Fide* Merit Employment System 11

2. The City of Chicago Intentionally Discriminated Against Female Custodial Employees 15

Conclusion 17

TABLE OF AUTHORITIES

Cases

Brennan v. Board of Education, Jersey City, New Jersey, 374 F.Supp. 817 (D.N.J. 1974) 12

Cayce v. Adams, 439 F.Supp. 606 (D.D.C. 1977) 13, 14

Equal Employment Opportunity Commission v. Aetna Insurance Company, 616 F.2d 719 (4th Cir. 1980) 11

Hodgson v. Washington Hospital, 3 E.P.D. ¶8195 (W.D. Pa. 1971) 15

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) 15

PAGE

Personnel Adm'n of Massachusetts v. Feeney, 442 U.S. 256 (1979) 17

Reynolds v. Sims, 377 U.S. 533 (1964) 16

Schultz v. Wheaton Glass Company, 421 F.2d 259 (3d Cir. 1970) *cert. denied*, 398 U.S. 905 (1970) and on remand Schultz v. Wheaton Glass Co., 319 F.Supp. 229 (D. N.J. 1970) and later app. Hodgson v. Wheaton Glass Co., 446 F.2d 527 (3rd Cir. 1971) .. 15

United States v. City of Chicago, 544 F.2d 415 (7th Cir. 1977) 10, 16

Usery v. Board of Education of Baltimore City, 462 F.Supp. 535 (D. Md. 1978) 13, 14

Washington v. Davis, 426 U.S. 229 (1976) 10, 16

Constitutional Provisions and Statutes

Fourteenth Amendment to the United States Constitution 16, 17, 18

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e) 10

Equal Pay Act, Section 206(d)(1) of the Fair Labor Standards Act of 1938, 29 U.S.C. §206(d)(1) 10

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-953

CITY OF CHICAGO, a municipal corporation,

Petitioner,

vs.

NATIONAL ORGANIZATION FOR WOMEN, SUSIE BATES, MATTIE SCOTT, ODESSA GATES, ELEANOR PROTAS, and VERA SANFORD,

Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

In opposition to the Petition of the City of Chicago for a Writ of Certiorari, the Respondents, National Organization For Women, Susie Bates, Mattie Scott, Odessa Gates, Eleanor Protas, and Vera Sanford, submit the following Additional Statement of the Case and Reasons for Denying the Writ for consideration by the Court.

ADDITIONAL STATEMENT OF THE CASE

I. Custodial Employees

The Department of Personnel of the City of Chicago, at one time called the Civil Service Commission, has central authority to create job classifications and descriptions, develop and administer civil service examinations, oversee recruitment and training programs, certify payrolls, post eligibility lists for job openings and attend to other administrative matters relating to employment for the City of Chicago (R. Cole 307-308).

Until 1973, the Department of Personnel maintained two civil service job classifications for custodial personnel. Females were classified as janitresses and males as janitors. Men and women occupying these positions were, prior to their hire, required to take virtually identical written tests with no physical performance component. (Pl. Ex. 80 and 81). Joan Cole, Deputy Director of the Department of Personnel, admitted that such sex connotative job titles encouraged only members of the sex specified to apply. (R. Cole 521). Accordingly, there never were any female janitors. (R. Cole 516). When the City eliminated these gender-based job categories in 1973 in an attempt to comply with Title VII, it automatically reclassified all janitresses as custodial assistants and janitors as custodial workers. (R. Cole 520, 969). Not one of the employees took a test before this title change and none of their job duties changed. (R. Bates 4-5, 40; Myers 67; Bell 118; Scott 192; Lynch 230; Waller 251-52; Cole 355; Farlow 364). Nor did the civil service job descriptions for janitor and janitress change until several months after the titles were renamed. (R. Cole 481).

For years, janitors and janitresses did the same work but the janitresses were paid less for it. (Pl. Ex. 1, 33-42

and 79). The evidence showed that most janitors and all janitresses clean office areas of various municipal buildings. (R. White 638-40). Both janitors and janitresses testified that in their respective office areas they regularly empty wastebaskets into trash barrels called 'gondolas' (R. Bates 10, 42; Myers 70; Scott 197; Lynch 233; Waller 255; Lytle 1026; Bell 126; Farlow 368, 373; Johnson 404; Gore 1034), vacuum (R. Bates 21; Myers 78, 90; Scott 207; Lynch 234; Waller 255, 278; Bell 135; Farlow 368; Johnson 405), dust (R. Bates 11, 12-13, 42; Myers 78; Scott 196; Lytle 1026-27, 1028-29; Farlow 373; Johnson 405; Gore 1034); "spot-mop" (damp mop floors to wipe up dirty spots) (R. Bates 26; Scott 198, 206; Lynch 234; Waller 276; Bell 135; Farlow 38; Johnson 405; Gore 1034), sweep floors with dust mops (R. Bates 10-11; Myers 70, 78; Lynch 233; Bell 126; Farlow 368; Johnson 405; Gore 1034), and clean private washrooms (R. Bates 13; Lynch 235; Waller 255; Bell 126, 129, Farlow 373). The size of the areas cleaned by the men and women is substantially the same (Pl. Ex. 57, 61, 64, 70-78, 162, 163) and they all use the same cleaning equipment.

Janitors and janitresses who had the opportunity to observe each other working also indicated that men and women do the same work. (R. Bell 126-28; Farlow 374; Johnson 411; White 650-51). Moreover, many men and women exchanged or replaced each other in areas at various times. (R. White 650-61, 656, 665, 680, 808; Roundtree 1075; Bates 16-20, 34; Scott 219; Bell 126-128).

Some janitors are not assigned to clean offices but do essentially the same cleaning tasks in different parts of municipal buildings. (R. Gore 1034; Bell 136-37). The few janitors who do tasks different from the overwhelming majority of the janitors are paid the same wages as the other men. (Pl. Ex. 33-42 and 79).

Mr. White, a supervisor, testified that he assigned male office workers additional duties (R. White 800-01) but the testimony of individual janitors indicated that these were assigned infrequently, if at all, and took only a short time to complete, if assigned. (R. Farlow 374-76; Johnson 414-18; Bell 136-39).

For years the City was aware that male and female cleaning personnel were doing the same work. The job descriptions for janitor and janitress were virtually identical (Pl. Ex. 5 and 6). In October of 1972, James Dolan, a principal personnel analyst for the Classification Division of the City's Department of Personnel, did a job evaluation survey and report on the duties of janitors and janitresses in the Department of Public Works. He concluded that the men and women assigned to clean office areas were performing essentially the same tasks. (Pl. Ex. 1 at 3). He stated that "[s]ince both job classifications perform these same tasks with about the same frequency *it would indicate that different rates of pay for performance of this work is unjustified*" and warned that the situation could be a violation of Title VII. (Pl. Ex. 1 at 3 and 4).

Based upon Mr. Dolan's report, Dr. Charles Pounian, Head of the Department of Personnel, wrote to Milton Pikarsky, Commissioner of the Department of Public Works, in 1973 and related that in certain instances custodial workers and custodial assistants were doing identical work. (Pl. Ex. 9).

The City's response was simply to rename the positions to eliminate "sex connotative" job titles. (R. Cole 521).

James Dolan performed a second study of the custodial worker and custodial assistant job classifications in 1973. (Pl. Ex. 10). He testified that there was no change of duties among the custodial employees since his first study.

(R. Dolan 598). On the basis of Dolan's second report, Dr. Pounian wrote a memorandum to Marshall Sulloway, then Acting Director of the Department of Public Works, in which he said, in part:

> At present all Custodial Workers are men and all Custodial Assistants are women. These separate designations are inappropriate in that the present assignments to titles label the work performed as either a man's job or a woman's job. This defines the type of work assigned to an individual on the basis of stereotyped notions about the sexes, rather than on an individual's suitability for that particular job.

(Pl. Ex. 10 at 16-17).

> It should be noted that not all Custodial Workers are required to perform tasks which require the expenditure of moderately heavy physical effort, and some do only light cleaning.

(Pl. Ex. 10 at 12).

Although Mr. Dolan suggested in his 1972 report that the pay of women be raised to equal that of men (Pl. Ex. 1 at 3), it was not done. Instead, as the City's annual appropriation ordinances reveal, there has always been and continues to be a significant differential in pay accorded the two classes of employees (Pl. Ex. 33-42 and 79), even though it is beyond question from the evidence that both do precisely the same work.

II. Clerical Employees

For more than twenty years, the City of Chicago has maintained the job title of yard clerk in the Department of Water and Sewers yet no civil service examination has ever been given for the position (R. Cole 964-65). While only men occupy the job classification of yard clerk (R.

Hedges 1107), other clerical positions in the Department of Water and Sewers such as head clerk and principal clerk, for which civil service examinations are given, are predominately female. (R. Cole 965-66). Women doing the same work as the all male yard clerks are paid less than those men. (R. Hedges 1105-06).

The job descriptions for yard clerk, principal clerk and head clerk are all designated as within the "Clerical, Accounting, and General Office Group, General Clerical series" by the Department of Personnel. (R. Cole 958, Pl. Ex. 141, 142 and 144). A comparison of the duties contained in the job descriptions for those job titles shows that they are primarily clerical. (Pl. Ex. 141, 142 and 144).

The work yard clerks do is revealed in several CS-15 forms.[1] Alex Mundo, author of one of these forms testified that his work as a yard clerk had not changed over the years. (R. Mundo 1125, Pl. Ex. 105).

These forms show that yard clerks perform a variety of clerical tasks and office work. In addition to timekeeping and payroll work (Pl. Ex. 102, 106), yard clerks also keep track of the costs of particular contracts or jobs by maintaining a ledger in which costs and expenses attributable to specified components of the contract or job are listed, process requisitions for materials, maintain records of stock inventory, answer telephone calls and record information received with respect to customer complaints of water leaks (referred to as "leak desk" work), work on

---

[1] A CS-15 is a form which employees fill out describing the duties of their positions and the frequency and percentage of the time spent on such duties for use by the Department of Personnel. (R. Cole 961).

the switchboard and process purchase orders and vendor's receipts. (Pl. Ex. 102, 103, 104, 105, 106). One yard clerk keeps an inventory of meters and meter repairs. (Pl. Ex. 106). The percentage of time devoted to specified duties is also listed on these CS-15s and for yard clerks they show that each of the men spent 100% of his time on one or more clerical tasks. (Pl. Ex. 102-106).

The clerical nature of yard clerk duties is buttressed by the testimony of several of the City's witnesses. (R. La Verde 1129, 1130-31, 1138-39; Del Monte 1146, 1155; Adduci 1168-1169; Mundo 1210, 1215, 1216-18; Monihan 1220; Kinsella 1287-1288).

The testimony of the female clerical employees establishes that they perform substantially similar if not identical tasks to those of the yard clerks.

For example, Eleanor Protas, a named plaintiff, was classified as a principal clerk and worked in the timekeeping section of the Water Distribution Division's Plumbing Inspection Section (R. Protas, 695) along with a yard clerk, Mr. Ed Owens, and a laborer, Mr. Glen Casey. (R. Protas 711). Her particular duty was to determine the number of days of a particular payment period, and then, within that period, to allocate the hours and costs of each employee to the proper charge account or order number. (R. Protas 698-699).

More specifically, according to a CS-15 job evaluation form Ms. Protas prepared for the City in October of 1968, her job required her to do such things as:

> Calculate the daily pay rate of classified monthly employees for a given pay period. Make daily distribution of pay rate to proper appropriation accounts. Verify daily attendance of employees. Prepare daily field worksheet containing time (man hours), material

and truck costs as well as designate work location of all employees on payrolls 4228 and 4229. Transcribe said information to the Chief Timekeeper for purpose of checks and balances of Time Roll.

Prepare and balance totals on Time Rolls. Balance daily cost sheets with gross earnings on Time Rolls. Maintain a general card file showing the exact daily account of employees' payroll action code.

Prepare a detailed summary data report semi-monthly of the man-hours and cost by appropriation for the cost analyst section.

Review statements by mechanics, plumbing inspectors and others pertaining to expenses and make adjustments.

(Pl. Ex. 90).

Mr. Owens, who was deceased by the time of trial, kept track of attendance and salaries, the totals of which had to agree over the pay period with the totals of Ms. Protas' daily reports. (R. Protas 700). He also made some changes on the printed payroll. (R. Protas 701). Mr. Casey assisted Mr. Owens in making up the payroll by keeping the book for the timesheets submitted by employees. (R. Casey 819). When one of the three went on a vacation or was absent, the other two would do the missing person's work as well as their own. (R. Protas 710). Mr. Owens did no manual labor (R. Protas 701), and neither did Mr. Casey. (R. Protas 708, Casey 824).

Other women holding various civil service job classifications also testified to duties they perform which are the same as those done by male yard clerks. (R. Kavanaugh 834-40; Dorris 904-05; Francois 938-40; Gates 916-20).

The City attempted to show that the yard clerks do manual labor in addition to their clerical duties but the District

Court found that the City's witnesses on this point "came off second best as far as credibility is concerned" (Appendix, p. 15a) and held in favor of the clerical class.

The City was long aware of the disparity in wages between the male yard clerks and female clerical employees. The CS-15 forms of Ms. Protas and various yard clerks prepared in 1968 show that men and women were doing the same work. (Pl. Ex. 102-106, 90). Moreover, in January of 1972, Ms. Protas filed a complaint with the Illinois Fair Employment Practices Commission charging the City with sex discrimination.

In response, the City proceeded, without prior notice, to dismantle Ms. Protas' timekeeping section over a weekend and move it to another location in the City. (R. Protas 733). Ms. Protas arrived at work on February 23, 1972 to find the desks of her co-workers gone with her own desk in disarray with articles from its drawers strewn about the floor. (R. Protas 733, 34). For three days, Ms. Protas was given no work to do. (R. Protas 736). Nor was she told of the whereabouts of her section or why she had been left behind. (R. Protas 736). Finally, at the end of this period of enforced inactivity, she was offered occasional typing and filing assignments of a sort she had done long ago, when first employed by the City. (R. Protas 736). But, she was only given a few hours work a day, and her timekeeping responsibilities were never returned to her (R. Protas 737). At the time of trial, Ms. Protas' job duties still had not been restored. (R. Protas 737).

SUMMARY OF REASONS FOR DENYING THE WRIT

Whether or not the City of Chicago has a merit employment system which provides a defense under the Equal Pay Act, 29 U.S.C. §206(d) and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* to charges that the City paid female custodial employees and clerks less than their male counterparts for the same work is a question of fact which has been resolved adversely to the City at the trial level (Oral Decision p. 4, Appendix, p. 21a) and by the Seventh Circuit Court of Appeals. Because the question is only one of fact, it is inappropriate for review by the Supreme Court of the United States.

The City also invites this Court to determine whether knowledge of the disparate impact of an employment practice is sufficient to show intent under the Fourteenth Amendment to the Constitution of the United States. The decision of the Seventh Circuit Court of Appeals characterizes this case as one of disparate treatment, not impact, and bases its opinion upholding a finding of intentional discrimination against female custodial employees on that ground. (Unpublished Order, p. 7, Appendix p. 34a). There is no conflict, therefore, between the portion of the Seventh Circuit Court of Appeals' decision quoted by the City (Petition pp. 10-11) from *United States* v. *City of Chicago,* 544 F.2d 415 (7th Cir. 1977) which sets a standard for proof of intentional discrimination in a disparate impact case and its opinion here. Nor is the Court of Appeals' decision in this case inconsistent with the Supreme Court's decision in *Washington* v. *Davis,* 426 U.S. 299 (1976) which is concerned with a disparate impact situation. Accordingly, there is no conflict between decisions of the Seventh Circuit Court of Appeals and none between the Seventh Circuit Court of Appeals and this Court to justify the grant of the City's Petition.

REASONS FOR DENYING THE WRIT

1.

The City of Chicago Has No Bona Fide Merit Employment System.

It is a question of fact whether the City of Chicago has a *bona fide* merit employment system which brings it within the exception under Title VII and the Equal Pay Act for "merit systems". Whether a merit system "serves to allow disparate pay resulting from the application of objective standards that measure how well different employees do the equal work" as the Seventh Circuit Court of Appeals stated in its opinion, (Unpublished Order, p. 5, Appendix, p. 32a) or is "an organized and structural procedure whereby employees are evaluated systematically according to predetermined criteria", as the Fourth Circuit concluded in *Equal Employment Opportunity Commission* v. *Aetna Insurance Company,* 616 F.2d 719, 725 (4th Cir. 1980) and upon which the City relies (both interpretations are compatible and not inconsistent as the City contends), the facts show that the City's employment system cannot be considered a merit system at all.

For years the City classified custodial employees on the basis of sex, maintained job descriptions for janitors and janitresses which were virtually identical (Pl. Ex. 5 and 6), kept separate job classifications for women doing identical or similar work to the men (Pl. Ex. 5, 6 102-106 and 90; R. Cole 521), paid the women less than men for the same work (Pl. Ex. 33-42, 79; R. Hedges 1105-07), harassed and retaliated against women who complained about their discriminatory treatment (R. Protas 733-34), adminis-

tered written tests alike in almost every respect to janitors and janitresses before they were hired and then always placed women in the lower paying janitress title (Pl. Ex. 80, 81; R. Cole 516), established and retained the "yard clerk" job title for over twenty years without ever holding a test for the position (R. Cole 964-65), and maintained the job categories of janitor/custodial worker and yard clerk composed exclusively of males. (R. Cole 516; Hedges 1107). In other cases where it has been shown that men and women doing the same or similar work are classified differently and the women paid less, courts have rejected the claim that such employment practices constitute a *bona fide* merit system.

In *Brennan* v. *Board of Education*, 374 F.Supp. 817 (D. N.J. 1974), female cleaners classified as custodial maids sought pay equal to male custodial workers. Both groups were hired and paid under the New Jersey Civil Service System. Even though the court found that the men and women performed substantially similar work, the Jersey City Board of Education contended that the classification and payment of the workers under a civil service system was a factor other than sex for purposes of the Equal Pay Act. The court did not agree and said:

> An invalid classification system administered in this fashion does not become valid simply because it is approved or promulgated by the State Civil Service Commission. The state's apparent recognition or acceptance of the concept that jobs may be different or unequal is not evidence that the jobs are truly unequal or that different classifications are *bona fide* under the Act.

374 F.Supp. at 830.

Accordingly, the court rejected the School Board's defense.

To the same effect is *Usery* v. *Board of Education of Baltimore City,* 462 F.Supp. 535 (D. Md. 1978). There the Board of Education argued that the payment and classification of custodial employees was pursuant to a *bona fide* job classification scheme, and thus the pay differential between male and female custodial personnel was based on a factor other than sex. In rejecting that argument, the court stated,

> Once the Secretary has made out a prima facie case that the classification system itself has not been followed by the defendant or that the system itself is a violation of the Act, it would be incongruous for the system, in and of itself, to be adjudged a valid defense. The Department of Labor's regulations do not mention job evaluation plans as a possible "factor other than sex." 29 C.F.R. §§800.140-800.151. Nor are such plans generally considered to be within the exception. Once the Secretary demonstrates that jobs are substantially equal, then *a fortiori* the job classification plan cannot, simply because it is characterized as *bona fide,* stand in and of itself as a valid defense.

462 F. Supp. at 569.

In *Cayce* v. *Adams,* 439 F. Supp. 606 (D.D.C. 1977), the court also declined to accept a civil service classification system as a defense to a sex discrimination complaint. A female employee of the Federal Aviation Administration who prepared statistical publications similar to a male occupying a higher paying job classification sought back pay. The following language of the court is instructive:

> However *'bona fide'* the Civil Service Classification system appears on paper, if it is not applied in a sex-blind manner, differences are not entitled to exemption from the operation of the Equal Pay Act. A classification system reflecting differences based on sex, whether as drafted or as applied, cannot be *bona fide.* The question here is not the *bona fides* of the system

> as drafted but whether the system as applied benefited Thompson over the plaintiff because of his sex. If it did, the exemption is not available.

439 F.Supp. at 608.

In *Cayce,* the court concluded that the pay differential "was sex-based as a matter of law and fact". 439 F.Supp. at 609.

The principles to be learned from these cases are applicable here. First, *Usery* v. *Board of Education of Baltimore City,* 462 F.Supp. 535 (D. Md. 1978) teaches that a job classification plan such as a civil service system is not automatically considered an exception to the civil rights laws and, in fact, is not generally thought to be within the exception. Second, a job classification scheme which causes men and women who do the same work to be placed in separate classifications with the female position being assigned lower pay cannot be *bona fide.*

The evidence overwhelmingly establishes that the City of Chicago's employment system is anything but *bona fide.* The City created and then maintained gender based job titles for male and female custodial personnel until goaded by Title VII into renaming the positions in 1973. Then the City merely classified janitors as custodial workers and janitresses as custodial assistants even though by that time the City was aware from Mr. Dolan's 1972 report that janitors and janitresses were doing the same work. Indeed, the job descriptions for janitors and janitresses show that both had done substantially similar work for years. The women, however, were always paid less. (See text and citations *supra* at pp. 2-5; Pl. Ex. 5 and 6.)

The situation with the clerks is no less aggravated. For at least 20 years, the City maintained the job title of 'yard clerk" yet no civil service examination was ever given that position. (R. Cole 964-65). Only males were

classified as yard clerks, even though female clerical employees with various job titles did exactly what yard clerks do. Yet male yard clerks were always paid more. (See text and citations, *supra* at pp. 5-9.)

The City of Chicago had the burden of proving that its employment system was a *bona fide* merit system and was, therefore, an exception under Title VII and the Equal Pay Act. *Schultz* v. *Wheaton Glass Co.*, 421 F.2d 259 (3rd Cir. 1970); *Hodgson* v. *Washington Hospital,* 3 E.P.D. ¶8195 (W.D.Pa. 1971). Yet the City failed to introduce any evidence to show that the wage differential between men and women doing the same work was attributable to any factor other than sex. That is why the City's reliance on *International Brotherhood of Teamsters* v. *U.S.*, 431 U.S. 324 (1977) is misplaced. There the seniority system applied to everyone equally. A system by which pay differentials are based solely on neutral factors such as length of employment and which are applied in the same fashion to men and women is not at all what we are talking about here. In this case, the Plaintiffs proved that the City of Chicago classifies men and women doing the same work into different job categories and then assigns a lower salary to the female position. Such a system can hardly be considered neutral in its inception or as applied. Accordingly, the City's defense on the basis that its employment system is a *bona fide* merit system must be rejected.

2.

The City of Chicago Intentionally Discriminated Against Female Custodial Employees.

The Seventh Circuit Court of Appeals recognized that this is a case of disparate treatment of women, not of disparate impact as the City contends. That is one reason why there is no conflict at all between the Court of Ap-

peals' decision here and the opinion of the Supreme Court in *Washington* v. *Davis,* 426 U.S. 299 (1976) and that of the Seventh Circuit Court of Appeals in *United States* v. *City of Chicago,* 549 F.2d 415 (7th Cir. 1977) in the portion quoted by the City (Petition pp. 10-11). Both of those cases are concerned with neutral employment practices which have a disparate impact.

There can be no doubt, however, that the Seventh Circuit Court of Appeals correctly upheld Judge Grady's finding of intentional discrimination against female custodial employees by the City of Chicago.[2]

In essence, the equal protection clause of the Fourteenth Amendment requires that persons similarly situated be treated equally. *Reynolds* v. *Sims,* 377 U.S. 533 (1964). Here that was not done. The City for years classified male and female cleaning personnel into the separate job classifications of janitor and janitress, assigned both groups the same work and paid the men more. Joan Cole admitted that sex connotative job titles encouraged only members of the sex specified to apply for the job. (R. Cole 521). The expected result occurred here for all the janitresses were women and all the janitors men. This discrimination was not cured by renaming these job titles because all janitors were automatically reclassified into the higher paying custodial worker title while janitresses were shunted into the lower paying custodial assistant classification thus continuing the effects of the City's discriminatory classification system. Moreover, both before and after the title change, the female custodial employees continued to do the same work as the men as shown by the job descriptions

---

[2] The Court of Appeals deferred ruling on the issue of intentional discrimination against female clerks because the Court reversed and remanded the clerks' part of the case to Judge Grady for further written findings to be made.

for janitor and janitress and Mr. Dolan's 1972 and 1973 reports. (See text and citations, *supra,* 2-5.)

The Seventh Circuit Court of Appeals observed in its decision that proof of intentional discrimination is required under the Fourteenth Amendment. But as the Supreme Court stated in *Personnel Adm'n of Massachusetts* v. *Feeney,* 442 U.S. 256 (1979) in discussing intent:

> . . . The inquiry is practical. What a legislative or any official entity is "up to" may be plain from the results its actions achieve, or the results they avoid.

442 U.S. at 279 n. 24.

In this case, there can be no doubt that the City expected and intended that the maintenance of explicitly discriminatory job titles for janitors and janitresses, the assignment of the same work to both groups and the payment of lower wages to the women would result in a denial of equal protection to the female custodial employees. The City's actions can be explained on no other basis.

Therefore, the City of Chicago's Petition for a Writ of Certiorari should be denied. The City presents a question for review which was not decided by the Seventh Circuit Court of Appeals. Moreover, whether intentional discrimination is shown or not ultimately depends upon the facts which amply demonstrate intentional discrimination in this case.

CONCLUSION

The City of Chicago has failed to carry its burden of showing that it is entitled to review of the questions presented. First, the question of whether the City has a *bona fide* merit employment system is a question of fact. Second, the question of whether knowledge of the disparate impact of an employment practice is sufficient to show

intent under the Fourteenth Amendment to the Constitution of the United States was not decided by the Seventh Circuit Court of Appeals which viewed the case as one of disparate treatment and appropriately reviewed the facts relating to intent for purposes of the Fourteenth Amendment in that light. There is no conflict, therefore, between the Court of Appeals decision in this case and other Seventh Circuit and United States Supreme Court decisions concerned with the question of intentional discrimination where disparate impact is alleged. Accordingly, Respondents respectfully request this Court to deny the City's Petition for Writ of Certiorari.

Respectfully submitted,

R. Marlin Smith
Ross, Hardies, O'Keefe, Babcock & Parsons
One IBM Plaza, Suite 3100
Chicago, Illinois 60611
Counsel for Respondents

Barbara Baran,
Ross, Hardies, O'Keefe, Babcock & Parsons
One IBM Plaza, Suite 3100
Chicago, Illinois 60611
(312) 467-9300

Kay Simon Grossman,
Chicago Lawyers Committee
For Civil Rights Under Law
220 South State Street
Room 300
Chicago, Illinois 60604
(312) 939-5797
Of Counsel